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MCTC Bulletin

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President's Communiqué

Dear Members,

अभिवादन शीलस्य नित्यं वृद्धोपसेविनः ।
चत्वारि तस्य वर्धन्ते आयुर्विद्या यशो बलम् ।।

For a person who is polite and serves/respects old people, four things viz., life (number of years), knowledge, success in life and strength increase. In short, such person lives a successful life.

We need to take comments of Hon'ble HC on payment of tax in positive way.

The negative rate announced by Bank of Japan to charge banks for holding excess liquidity, will complicate the task of currency management all over world. Whatever may be impact, this step speaks volumes.

Recent negative sentiment in Stock market do indicate that the comments of RBI Governor is very valid. This can be indicator of global scenario. The same was pointed by us in earlier issues. Earnest request to all fellow members to put your investments in safer zones. Gold is considered as best bet in times of emergency.

The Students' Workshop organised by us at DTSS College was well attended by 160+ students who were benefited by getting practical knowledge of the field. We are inclined to organise more such workshops for students.

'Make in India' drive of our beloved Prime Minister is not just restricted to manufacturing or trading sector. It also applies to Indian service providers. All service providers need to excel in their own field to get self-approval to be ready for the robust growth in demand for Indian service provider world over due to the drive.

Much awaited flagship event of the Chamber, Public Meeting for Union Budget will be held on 2nd March. Details of the same is given under the Forthcoming Events.

Once again I invite articles of professional interest from experts.

WISH YOU HAPPY MAHASHIVRATRI

Regards,
Jayprakash M. Tiwari
President

With Regards

≈ TEAM MCTC ≈

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DIRECT TAXES – LAW UPDATE

Compiled by CA. Haresh P. Kenia

- **TRANSFER PRICING–NOTIFIED TOLERANCE LIMIT U/S 92C(2) [234 TAXAMAN (st.) 176]**
  The Central Government *vide* notification No. 86/2015 dated 29-10-2015 in exercise of the powers conferred by the third proviso to section 92C(2) read with rule 10CA(7) (proviso) of the Income Tax Rules,1962 notifies that where the variation between the arm's length price determined under section 92C and the price of which the international transaction or specified domestic transaction has actuality been undertaken does not exceed, one per cent. of the latter in respect of wholesale trading and three per cent, of the latter in all other cases, the price at which the international transaction or specified domestic transaction has actually been undertaken shall be deemed to be the arm's length price for Assessment Year 2015-16. The circular also gives the definition of "wholesale trading".

- **EXTENSION OF DUE DATE FOR FILING OF RETURNS OF INCOME AND AUDIT REPORTS U/S 44AB-CORRIGENDUM TO ORDER [F. NO. 225/207/2015/ITA-II], dated 1-10-2015**
  The CBDT *vide* Order F. No 225/207/2015/ITA-II, dated 29-10-2015, clarifies that the extension of due date of filing of Return of Income is also applicable to requirement to obtain and furnish "Report of Audit "under various provisions of the Act. It is hereby clarifies that the "due date" for obtaining and E-filing report of audit under various provisions of the Act pertaining to such Returns of income also stands extended till 31-10-2015. This clarification is corrigendum to order dated 1-10-2015 wherein the CBDT has extended the "due date" for E-filing Return of income from 30th September, 2015 to 31st October, 2015 in case of income tax assessee's which are covered by section 139(1) under explanation 2(a) of the Income-tax Act.

- **FINANCE ACT, 2015 – EXPLANATORY NOTES TO THE PROVISIONS OF THE SAID ACT. [235 TAXAMAN (st.) 67]**
  The CBDT *vide* Circular No. 19/2015 Dated 27-11-2015 gives amendments at a glance being explanatory notes to the provisions of the Finance Act, 2015. One may referred to above citation for more details

- **DEDUCTION OF TAX AT SOURCE U/S 192 OF THE INCOME TAX ACT, DURING THE FINANCIAL YEAR 2015-16 [236 TAXMAN (st.) 25]**
  The CBDT vide circular no 20/2015, dated 2-12-2015 contains the rates of deduction of income tax from the payment of income chargeable under the head "Salaries" during the financial year 2015-16 and explains certain related provisions of the Act and Income Tax Rules.

- **DEDUCTION U/S 80P OF THE ACT FROM INCOME OF CO-OPERATIVE SOCIETIES – INTEREST FROM NON-SLR SECURITIES OF BANKS [235 TAXMAN (st.) 6]**

  The CBDT *vide* circular No. 18/2015, dated 2-11-2015 has clarified the decision of Board that no appeals will be filed by the department in view of the Supreme Court decision in the case of *CIT vs. Nawanshahar Central Cooperative Bank Ltd.* 160 Taxman 48 (SC), wherein the court held that the investment made by banking concern are part of business of banking. Therefore, the income arising from such investments is attributable to the business of banking falling under the head "Profit and Gains of Business and Profession". It also clarifies that though the decision was in the context of co-operative Societies/ Banks claiming deduction u/s 80P(2)(a)(i) of the Income Tax Act, the principle is equally applicable to all banks/commercial banks, to which Banking Regulation Act,1949 applies.

  The Board has issued above clarification in view of the fact that field officers are taking a view that, "expenses related to investment in non-SLR securities need to be disallowed u/s. 57(i) of the Act as interest on non-SLR securities is income from other sources"

  In light of the Supreme Court's decision in the matter, the Board is of the view that the issue is well settled and accordingly decided that no appeals may henceforth be filed on this ground by the officers of the department and appeals already filed on this ground before Courts/Tribunals may be withdrawn/not pressed upon.

JUDICIAL JUDGMENTS

Compiled by CA Dharmen Shah and CA Rupal Shah

Abdul Hameed Khan Mohammed vs. ITAT Chennai

No withdrawal of sec. 54 relief if new house was transferred to daughter within 3 years

Facts of the case

Assessee sold his residential property and invested sale proceeds in another residential property. He claimed exemption under section 54 in respect of capital gains arising on sale of property.

Later on, he settled the new property to his daughter out of love and affection. He submitted that the settlement of property in favour of the daughter was a gift falling under section 47(iii) and was not taxable.

The assessing Officer held that settlement did not cover under section 54(i) or 54(ii) and accordingly held that the exemption granted u/s. 54 to the assessee in the prior year should be withdrawn since the assessee has transferred the property before completion of 3 years from the acquisition of the new flat.

The Assessee filed an appeal before CIT (Appeals) and the Commissioner allowed Assessee's claim for exemption. Therefore, aggrieved-revenue filed appeal before Tribunal.

ITAT held in the favour of the assessee observing that,

After availing exemption the assessee had settled the property in favour of his daughter by duly following the process of law. Assessee transferred the immovable property out of love and affection without consideration to his daughter. The same was a gift and did not attract capital gains as per the provision of section 47(iii) of the Income-tax Act, 1961.

Assessee had complied with the provisions and conditions as laid down under section 54 of the Act. It could not be said that assessee had violated provisions of section 54 just because he settled the property in favour of his daughter within 3 years of acquisition.

Thus, the exemption granted u/s. 54 in the prior year cannot be revoked.

However, ITAT emphasized that during the restriction period, the daughter shall not transfer the property by any means.

Rashtriya Ispat Nigam Limited vs. ACIT (Vishakhapatnam Tribunal)

Employer not liable to deduct TDS at flat rate of 20% on non-furnishing of PAN by employees

Facts of the case:

Assessee-employer deducted TDS as per section 192 in respect of salary to the employees who failed to furnish PAN or the employees who furnished incorrect PAN.

The Assessing Officer (A. O.) being of the view that the assessee should have applied provisions of section 206AA of the Income-tax Act, 1961 and deducted TDS at flat rate of 20% instead of deducting TDS as per provision of section 192 of the Income-tax Act, 1961. Thus, holding assessee liable for short deduction of TDS.

The assessee filed an appeal to contest the order of the AO.

The Tribunal held in the favour of the assessee observing that,

As per section 206AA of the Income-tax Act, 1961, if the deductee fails to furnish PAN, then the deductor shall deduct tax at the rates which is higher of:

(i) At the rates specified in the relevant provisions of the Act, or

(ii) At the rate or rates in force, or

(iii) At the rate of twenty per cent.

A careful reading of the provisions of section 206AA make it clear that it is not automatic that tax shall be deducted at a flat rate of 20% wherever PAN is not furnished.

Unlike other provisions, TDS on salary cannot be deducted by applying flat rate of tax on gross payment. It is not necessary that all payments would fall under 20% flat rate, in some cases the rate of tax may be at 10% and in some cases it may be at 30%.

Therefore, the contention of AO for deduction of TDS at flat rate of 20% does not hold good. Hence, the assessee cannot be held liable for short deduction of TDS and consequences thereof.

UPDATES ON SERVICE TAX

Compiled by CA Bhavin Mehta

CBEC Letter F. No. 390/MISC./163/2010-JC dated 1st January, 2016 providing monetary limits for filing appeals by the Department before CESTAT/High Courts and Supreme Court: CBEC has clarified related to increase in monetary limits below which appeal shall not be filed by the Revenue in Tribunal, High Court & the Supreme Court. The said instruction will apply to all pending appeals in High Courts / CESTAT. Central Board of Excise & Customs *vide* its instruction dated 17-12-2015 fixes following monetary limit below which appeal will not be filed in the Tribunal, High Court and the Supreme Court.

S. No.	Appellate Forum	Monetary Limit (₹)
1.	CESTAT	10,00,000
2.	HIGH COURT	15,00,000
3.	SUPREME COURT	25,00,000

CBEC, Circular No. 1013/1/2016-CX dated 12th January, 2016 Guidelines for implementation of e-payment of refund/rebate: CBEC has issued guidelines for implementation of e-payment of refund/rebate. The claimants opting for this facility shall provide one-time authorisation in prescribed format in duplicate, duly certified by the beneficiary bank while filing refund/rebate claim for the first time. The refund sanctioning authority would forward a signed statement, a cheque in favour of bank for the consolidated refund/rebate amount. On receipt of sanction the bank would credit the amount to the respective accounts of the claimant through NEFT/RTGS. The Circular may be referred for detailed guidelines related to procedure for e-payment & reconciliation of such e-payments by department.

Letter F.No. 354/311/2015TRU dated 20th January, 2016 – Report of the High Level Committee; recommendation regarding valuation of flats for levy of Service Tax: CBEC has clarified on the valuation of flats handed over by the builders/developers to the landowners under tripartite construction model. It is clarified by CBEC that the value of these flats would be equal to the value of similar flats charged by the builders/developers from the other buyers.

In case the prices of flats/houses undergo a change over the period of sale (from the first sale of flat/house in the residential complex to the last sale of the flat/house), the value of similar flats as are sold nearer to the date on which land is being made available for construction should be used for arriving at the value for the purpose of tax.

Service tax is liable to be paid by the builder/developer on the “construction service” involved in the flats to be given to the land owner, at the time when the possession or right in the property of the said flats are transferred to the land owner by entering into a conveyance deed or similar instrument (e.g. allotment letter).

CBEC has further clarified that since the above clarifications issued by Circular No.151/2/2012-ST dated 10th February, 2012 are in accordance with the provisions relating to valuation as laid down in the Finance Act, 1994 and the Service Tax (Determination of Value) Rules, 2006, the said Circular shall prevail over the CBEC Education Guide on Taxation of Services, 2012 which states that the value of construction service provided to such land owner will be the value of the land when the same is transferred and the point of taxation will also be determined accordingly.

Our Comments

Inflow of Development Right is used in following outflow for developer/builder:

(i) Expenditure in the form of construction of flat/shop for landlord/tenant/members;

(ii) Sale of flat/shop to outsider.

Service Tax payable by Builder/Developer

On sale of flat/shop to outsider tax payable on service component or on 25%/30% of sale value of flat, as the case may be. However, if entire consideration is received after OC, no tax would be payable. The tax which remains to be discharged would be on expenditure i.e. service portion in the construction of flat of the buyer, which would be cost of provision of service. The above circular in our view is not in consonance with law.

Notification No. 2/2016-C.E. (N.T.) dated 3-2-2016 –

(i) Commission on excisable goods considered as 'Sales Promotion'. In order to overcome Gujarat High Court judgment in the case of GSFC [2016] 65 taxmann.com 283 (Gujarat)], Govt. of India has brought amendment in the definition of 'input service' as defined in rule 2(l) of CCR, 2004, by inserting the explanation, namely, "for the purpose of this clause, sales promotion includes services by way of sale of dutiable goods on commission basis".

(ii) Specific restriction inserted for non-availment of Swachh Bharat Cess. Proviso in inserted in rule 3(4) after sixth proviso as under:

"Provided also that the CENVAT credit of any duty specified in sub-rule (1) shall not be utilised for payment of the Swachh Bharat Cess leviable under sub-section (2) of section 119 of the Finance Act, 2015 (20 of 2015)".

GIST OF RECENT JUDGMENTS WITH RESPECT TO SERVICE TAX AND CENTRAL EXCISE

Compiled by CA Bhavin Mehta

1. Engaging cricketers to endorse products and brand by such cricketers through various mediums viz. television, radio, display on cricket bats, etc. amounts to 'Advertising Services' and is liable to service tax ***[Percept D Mark (India) (P.) LTD. v/s Commissioner of Service Tax, Mumbai, [2015] 64 taxmann.com 71 (Mumbai - CESTAT)]***

FACTS

Under a Tripartite agreement between assessee, Hero Honda and cricket players, assessee was providing services to Hero Honda involving endorsing products and brand of Hero Honda by cricket players as models through various mediums.

Department demanded Service Tax under advertising agency services involving extended period and penalties for periods 1.4.2000 to 30.6.2003

HELD:

The Counsel for the appellant submitted that the main object of the contract is to grant endorsement right to use and exploit the player's identification; therefore as far as services of appellant, they themselves are not providing any advertising services but would be liable w.e.f. 01.07.2003 under the category of Business Auxiliary Service.

The Dy. Commissioner appearing on behalf of the Revenue held that, it is a Composite Contract under which the ultimate service provided through cricket celebrity is to promote and publicize the Brand of Hero Honda Motors Ltd. Therefore it involves advertising services only and nothing else.

The Hon'ble Tribunal after considering the submissions made by both the sides, held:

From the above tripartite agreements, it clearly shows that all the cricket players are engaged through the assessee in providing advertisement and promotion of the product of Hero Honda Motors Ltd. The assessee is paid the consideration towards advertisement performed by the celebrities. The payment consideration towards advertisement performed by the celebrities are received by the assessee, therefore assessee is legally liable for payment of service tax under the category of advertising services during the period involved in the present case.

As regard the contention of the assessee that the services are of promotion of sale of goods of Hero Honda Motors Ltd. and therefore the same is classified as Business Auxiliary Service which became taxable only from 1-7-2003, said contention is not tenable for the reason that services of celebrities have nothing to do with the promotion of the sale. Whether sale is promoted or not, the service of celebrities is confined to display of brand and advertise the product of Hero Honda Motors Ltd. therefore services are clearly of 'advertising services' and not of BAS.

2. Sorting, Cleaning, Boiling and Freezing Vegetables/Fruits and subsequently packing it in unit packing to be sold to customers under brand name, amounts to 'processing in relation to agriculture' and is exempt from Service Tax ***[Tasty Bite Eatables Ltd. vs. Commissioner of Central Excise, Pune III, [2015] 64 taxmann.com 70 (Mumbai - CESTAT)]***

FACTS:

Assessee was engaged in preparation of vegetables and fruits by sorting, cleaning, boiling and freezing same and subsequently packing it in unit packing to be sold to their clients under brand name. The board *vide* circular number 143/12/2011 ST dated 26/5/2011 has clarified the taxability of an activity of processing on behalf of client in relation to agriculture. The said circular is reproduced.

"Subject:– Processing for or on behalf of client, 'in relation to agriculture' causing sale or purchase of agricultural produce -- reg.

Representations have been received that client processing of tobacco involving threshing and drying of tobacco leaves and client processing of raw cashew involving roasting/drying, shelling and peeling of raw cashew to recover kernel, are considered by the field formations as not falling within the meaning of the expression 'in relation to agriculture' appearing in Notification 14/2004-ST (as amended) dated 10th September, 2004, resulting in avoidable disputes and litigation

HELD

The Hon'ble Tribunal decided in favour of the assessee. The Hon'ble Tribunal referred the above circular dated 26/5/2011 and observed as under:

"In the cases represented, the agricultural produce namely tobacco or raw cashew, which are subject to client processing retains their essential characteristics at the output stage and therefore the processes undertaken on or behalf of client should be considered as covered by the expression 'in relation to agriculture'. Client processing which falls under business auxiliary service undertaken on the primary agricultural produce namely tobacco or raw cashew, does not result in any change in their essential character of tobacco or cashew. In the light of the above principle (i) process of threshing and drying of tobacco leaves and thereafter packing the same and (ii) processing of raw cashew and recovering kernel, undertaken for, or on behalf of, the clients by processing units are covered by the expression '... processing of goods for, or on behalf of, the client.....and provided in relation to agriculture,...' appearing in the said notification". The Tribunal held that in the facts of this case it is undisputed that appellant is undertaking the processing of vegetables on behalf of their client. The activity of processing the vegetables by the appellant will be in relation to agriculture hence not liable to service tax under Business Auxiliary Services.

The Hon'ble Tribunal further observed that "It is settled law that revenue officers cannot argue against the board's circular".

3. Where agreement is to appoint agent/stockist for sorting and selling goods of assessee, such stockist would be 'commission agent' and not 'sales promotion agent'; hence, commission so paid to him is ineligible for credit. ***[Gujarat State Fertilizers & Chemicals Ltd. vs. Commissioner of Central Excise, Customs & Service Tax, Surat – II, [2016] 65 taxmann.com 283 (Gujarat)]***

FACTS

Assessee paid commission to its agents/stockist and took credit of service tax charged on commission. Assessee claimed that agents were also engaged in Sales Promotion.

Department denied credit relying on the judgment in CCE v/s Cadila Healthcare Ltd. [2013] 32 taxmann.com 105 (Guj.)

The entire agreement was in the nature of appointing a partnership firm as stockist of the appellant company who would upon being supplied the goods would store the same and dispose of in the market at agreed rates upon which it would receive certain commission.

HELD:

The case was decided in favour of the revenue.

The adjudicating authority held that the payment made to the agent appointed by the appellant would not be eligible for CENVAT credit. The adjudicating authority relying on the decision in case of CCE v/s Cadila Healthcare Ltd. [2013] 32 taxmann.com 105 (Guj.) rejected the contention on the following observations:

In the instant case there is no material fact on record which could prove that commission agents of M/s. GSFCL has incurred expenses or involved by any means in sales promotion. Thus these commission agents are concerned with sales rather than sales promotion.

Input Service refers to any service used by the manufacturer directly or indirectly in relation to the manufacture of final products and clearance of final products from the place of removal. Therefore, services provided by the commission agent does not fall within the purview of the main or inclusive part of the definition of 'input service' as laid down in rule 2(1) of the Rules and, therefore, the assessee is not eligible for CENVAT credit in respect of the service tax paid on commission paid to the commission agents.

Our Comment: It is very rare, that for decision given against the assessee, amendment is brought by the Government. In order to overcome Gujarat High Court decision, Govt. of India has brought amendment in the definition of 'input service' through notification No. 2/2016-C.E.(N.T.) dated 3-2-2016, whereby in the definition of 'input service' sales promotion includes commission. Refer Current Updates in this Newsletter.

4. Where employee of foreign holding is deputed to Indian Subsidiary for a particular period and during that period employee was treated as 'employee' of Indian Subsidiary, salary paid to such employee by Indian subsidiary cannot be charged to service tax in view of Employer-Employee relationship under Section 65B(44)(b)

[Authority for Advance Ruling, Central Excise, Customs & Service Tax, New Delhi v/s North American Coal Corporation India (P.) Ltd., [2015] 64 taxmann.com 259 (AAR - New Delhi)]

FACTS

The assessee was an Indian Subsidiary of NAC-US, a US-based company. Mr. Sloan was on permanent roll of NAC-US.

Under tripartite agreement between assessee, NAC-US and Mr. Sloan: Mr. Sloan served the assessee for a particular term, his salary for said term was paid directly by assessee and his social security interests were taken care of by NAC-US and assessee was not reimbursing same to NAC-US.

Assessee sought advance ruling that salary paid to Mr. Sloan is 'service by employee to employer' and not 'service' under section 65B(44)(b).

Department relied upon earlier law to contend that it was manpower supply service. Department also argued that where the NAC-US is bearing the social security, this amounts to consideration paid by the NAC India for employing the services of Mr. Sloan and , therefore this will not amount to a pure service as contemplated in section 65B(44)(b).

HELD

There was a tripartite agreement between NAC-US, NAC India and Mr. Sloan. Under this agreement, the services of Mr. Sloan were to be utilised by NAC India for a particular term. It is apparent from the agreement that so long as Mr. Sloan serves in India, all his salaries are to be paid by the Indian Company i.e. NAC India. It is also provided in the agreement that even when Mr. Sloan stays in India and serves NAC, India his social security interests shall be taken care by the American Company.

The applicant relies on the definition of service and more particularly on the exclusion provision which is under Section 65(44)(b), which suggests that a provision of service by an employee to the employer in the course of or in relation to his employment shall not be included in the definition of service.

The agreement is very clear to suggest that so long as Mr. Sloan is serving in India, he will be treated to be the employee of the applicant.

Hence it was decided that there shall be no liability to pay service tax on the salary and the allowances payable by the applicant to the employee in terms of the dual employment agreement and such salary will not be liable to service tax as per the provisions of the Finance Act.

5. No CENVAT reversal can be demanded on exchange of Inputs with associate/related companies, as demand is revenue neutral; however, for infraction of procedural rule 3(5) of CENVAT Credit Rules, 2004, penalty is leviable *[Commissioner of Central Excise, Customs And Service Tax vs. TarapurGrease India (P.) Ltd., [2015] 64 taxmann.com 272 (Bombay)]*

FACTS

Three companies namely M/s Standard Oil and Grease, M/s. Tarapur Grease India Private Limited and M/s. Standard Grease, Silvassawere engaged in manufacturing petroleum, lubricating grease, lubricating preparations etc. These three companies have common directors and partners along with a common registered head office at Ghatkopar (East), Mumbai.

The basic raw materials used by all the companies are the same. The basic raw material procured was exchanged between these three entities on which CENVAT Credit is taken. To meet the urgent requirements of common raw materials, assessee used to exchange inputs with associate companies, which were commonly managed with common directors/partners and were into same business.

Rule 3(5) of the CENVAT Credit Rules, 2004 is the heart of CENVAT Scheme, where credit is allowed on receipt of Inputs and is reversed on removal of inputs.

Department alleged diversion of inputs and argued that removal of inputs required reversal of credit.

HELD

The case was decided in favour of the assessee.

It was held that:

The product namely the inputs which were raw materials for all the three companies arrived at the factories and were cleared without payment simply because they were exchanged with the associate companies. The Tribunal found that once the inputs have been delivered only at the factories of the assessees from the associate companies, then no loss occurs to revenue. The assessees would derive no benefit by not reversing CENVAT Credit on inputs, when sister concerns are also eligible to take CENVAT Credit. Therefore in the absence of cogent and reliable evidence particularly on the diversion of these inputs, the Tribunal applied the doctrine or principle of revenue neutrality.

The only procedure that was required to be complied with was clearance of the raw materials after reversing the credit availed on it. Thus, the duty amount should have been paid and thereafter when these inputs or raw materials were utilised in the manufacture of final product, the CENVAT Credit could have been claimed but this procedure was not followed.

Though procedure adopted was not as per law, however there was no revenue loss. Since there was no diversion of inputs, principle of revenue neutrality was applicable. Penalty was notionally imposed for infraction of procedural rule; hence, merely because of levy of penalty, conclusion as to 'revenue neutrality' was not vitiated.

PHOTOS OF STUDENTS WORKSHOP ON 30.01.2016

PHOTOS OF HALF DAY SEMINAR UNDER THE AUSPICES OF SHRI RAJUBHAI CHOKSHI ORATION FUND ON 06-02-2016

PHOTOS OF MOVIE PROGRAM FOR MEMBERS ON 25.01.2016

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